Supreme Court, U.S.
FILED
APR 29 2002
OFFICE OF THE CLERK

No. 01-1403

In the Supreme Court of the United States

THE COUNTY OF BEAVER, PENNSYLVANIA AND BEA SCHULTE, COMMISSIONER, IN HER INDIVIDUAL CAPACITY,

Petitioners,

v.

DELORES ARMOUR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Question Presented for Review by Petitioners Was Pressed or Passed upon in the Lower Courts.

Petitioners reply to the first issue raised by the Respondent, stated as: "Petitioners' failed to raise the issue with the district court or the court of appeals panel." The issue presented by Respondent is a misstatement of the standard for review applicable to this Honorable Court.

The traditional rule followed by this Honorable Court precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Respondent sets forth a string citation of cases in support of her theory that this Court should not consider an issue "not raised in the lower courts." Respondent's Brief p. 6-7. The majority of these cases are cited for the boilerplate proposition espoused by Respondent and are simply inapplicable to the issue presented to this Court. The cases involve new arguments raised by respondents, issues not raised in the petition for certiorari and claims not raised or addressed by the lower courts at any point in the litigation. This is not the situation in the case at bar and this Court need look no further than its decision in *Williams* to reject the argument raised by Respondent as a red herring.

Respondent asks this Court to ignore one half of the standard to be applied in granting certiorari and in the process ignore the precise holding of the Court of Appeals. As noted in *Williams*, the inquiry into whether a question has been pressed or passed upon "operates (as it is phrased) in the disjunctive...." *Id.* The grant of certiorari is permitted where the court of appeals has passed upon the question in issue, whether or not the issue was pressed in the precise manner

posed upon petition for certiorari. Time and again, this Court has granted certiorari in circumstances similar to that presented in the case at bar and there exists no rationale for deviating from this traditional rule at this juncture. See *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n. 8 (1991); *City of Springfield v. Kibbe*, 480 U.S. 257, 266 (1987).

In the case *sub judice*, the issue presented for review is the precise issue addressed by the Court of Appeals below. The question presented is whether the *Elrod/Branti* inquiry into whether a governmental position is entitled to First Amendment protection against patronage dismissals is a question of law for the court or a question of fact for the jury. It is difficult to comprehend how a rational argument can be made that this issue was not understood and passed upon by the Third Circuit, when the opinion of the Court specifically decides the issue. The Court of Appeals fashioned the question as "..whether being the personal secretary to a county commissioner is, without more, sufficient evidence to establish as a matter of law that political affiliation is an appropriate job requirement." App. C at 38a. The Court goes on to hold that "... determining whether the defendants, on whom the burden rests, have been able to establish that Armour's job falls outside the protections of *Elrod* and *Branti* is a mater for the factfinder, not for the District Court on summary judgment." App. C at 40a, n. 6. The Court of Appeals directly decided that the ultimate determination as to whether political affiliation was an appropriate requirement for the Respondent's job fell to the jury, rather than the court. Similar to the situation in *Williams* and the cases cited therein, the issue before this Honorable Court was pressed and passed upon in the courts below and has been sufficiently preserved to allow the grant of certiorari.

Respondent points to the procedural history of this case in support of her argument against granting certiorari. The procedural history is important, but not in the way propounded by Respondent. Respondent notes that Petitioners moved for summary judgment pursuant to Rule 56(c) claiming no material disputes of fact existed and entitlement to judgment as a matter of law. This is absolutely accurate, but not supportive of Respondent's position at all. Rule 56(c) specifically sets forth that standard for summary judgment. Petitioners could hardly have submitted a motion for summary judgment and ignored the standard imposed by the Federal Rule of Civil Procedure. Once again, Respondent confuses a fact-intensive inquiry, which the *Elrod/Branti* issue admittedly is, and a question of fact. The District Court identified the undisputed facts and applied the *Elrod/Branti* analysis to those facts to arrive at the legal conclusion that the position in question was not protected by the First Amendment.

The Respondent appealed from this decision. The respondent framed the question on appeal and consistently argued to the Third Circuit that the sum total of the evidence revealed a clerical position for which political affiliation was not an appropriate requirement, moving the Circuit Court to reverse the district court's decision to the contrary. The Third Circuit agreed with Armour's position ultimately deciding, not that the record was unclear or that there were disputes over the job duties, but rather that the evidence presented could be interpreted in different ways as to whether the position was protected under the First Amendment, and that the opportunity for differing interpretations raised an issue for the jury. The issue argued by appellant, responded to by appellee, and addressed by the Circuit Court was whether the position of commissioner's secretary was one for which political affiliation was an appropriate job requirement.

The Circuit Court did not determine that material issues of fact precluded summary judgment, but that the application of facts to the ultimate constitutional question was for the jury.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2, quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *Harris* was an ERISA case wherein respondent argued, in part, that petitioner had waived a theory under ERISA for failing to raise the issue below. The Court held "[e]ven assuming that petitioners did not pellucidly articulate this theory before the Seventh Circuit, it appears that the Seventh Circuit understood the tenor of the argument . . ." Id. In this case, the fact/law dichotomy is an argument subsumed within the overall issue presented to the Court of Appeals and clearly an issue not lost upon the Court, as its opinion squarely addresses the question. The issue presented for review had been raised and passed upon before the lower courts and it is now ripe for consideration by this Honorable Court.

CONCLUSION

For the foregoing reasons and the reasons contained in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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